Penang Port Commission v Kanawagi s/o Seperumaniam

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–252 OF 1994
MOKHTAR SIDIN, MOHD SAARI AND ABDUL KADIR SULAIMAN JJCA
27 FEBRUARY 2006

Civil Procedure — Judgments and orders — Application to amend — Appeal — Application by the respondent for an order that the extracted order of the Court of Appeal be amended

The respondent filed a writ against the appellant. The respondent then filed an application for O 14 summary judgment under the Rules of the High Court 1980 for three prayers. Order was granted for two of the prayers. There was no appeal against that decision. The respondent then applied for the damages to be assessed. The application by the respondent for the remaining prayer was also allowed. Being dissatisfied with the decision, the appellant appealed ('the first appeal'). In the meantime, the Deputy Registrar of the High Court assessed the damages as sustained by the respondent and on 24 October 1994 awarded damages in the sum of RM2,274,151.42 and interest at 8%pa from the date of judgment until the date of realisation. Being dissatisfied with the assessment awarded, the appellant appealed to the judge in chambers. In his affidavit, the respondent stated that there was no order for stay of execution against the damages assessed and the respondent levied execution of the assessed sum. The respondent obtained a garnishee order nisi and was subsequently made absolute. The appellant then applied for a stay of execution of the garnishee order. The application was dismissed. The appellant appealed against the decision of the learned judge dismissing the appellant's application for stay ('the second appeal'). Both appeals came up for hearing before the Court of Appeal on 26 February 1997. On 26 February 1997, the first appeal was called, heard and disposed of. The second appeal was fixed for hearing on the next day. The next day, when the court was to hear the second appeal, the presiding judge instructed the deputy registrar to recall the first appeal. The presiding judge then informed the parties that he was making a consequential order in respect of the first appeal in that the order of the Deputy Registrar of the High Court given on 24 October 1994 was to be set aside. This was an application by the respondent for the order that the extracted order of the Court of Appeal dated 26 February 1997 be amended by deleting the words '… DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran ganti rugi oleh timbalan pendaftar pada 24 October 1994 diketepikan …' contained therein.

Held, allowing the application:

(1) This matter would not be in this court if the appellant had conceded that the consequential order was made on 27 February 1997 after the presiding judge

instructed the Deputy Registrar to recall the first appeal. Had the appellant given their concession that the consequential order was indeed given on 27 February 1997, then the respondent could have proceeded to get leave from the Federal Court to appeal against that consequential order (see para 13).

(2) The consequential order was made and pronounced by the presiding judge. This was made on 27 February 1997 and not on 26 February 1997. Since the extracted order stated the consequential order was made on 26 February 1997, it was wrong. The order should be corrected and amended (see para 15).

[Bahasa Malaysia summary

Responden telah memfailkan writ terhadap perayu. Responden telah memfailkan satu permohonan untuk A 14 penghakiman terus di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 untuk tiga permohonan. Perintah telah diberikan untuk dua daripada permohonan tersebut. Tiada rayuan terhadap keputusan tersebut. Responden kemudiannya telah memohon ganti rugi ditaksir. Permohonan oleh responden untuk permohonan lain itu juga telah dibenarkan. Berasa tidak puas hati terhadap keputusan tersebut, perayu telah merayu ('rayuan pertama'). Sementara itu, Timbalan Pendaftar Mahkamah Tinggi telah mentaksirkan ganti rugi yang dialami oleh responden dan pada 24 Oktober 1994 telah mengawardkan ganti rugi sebanyak RM2,274,151.42 dan faedah pada 8% setahun dari tarikh penghakiman sehingga tarikh realisasi. Berasa tidak puas hati terhadap penaksiran award itu, perayu merayu kepada hakim dalam kamar. Dalam afidavitnya, responden menyatakan bahawa tidak ada perintah untuk penggantungan pelaksanaan terhadap penaksiran ganti rugi dan responden mengenakan levi ke atas jumlah penaksiran pelaksanaan. Responden telah memperoleh satu perintah garnisi nisi yang seterusnya menjadi mutlak. Perayu kemudiannya telah memohon satu penggantungan pelaksanaan perintah garnisi itu. Permohonan itu telah ditolak. Perayu telah merayu terhadap keputusan hakim yang bijaksana menolak permohonan perayu untuk satu penggantungan ('rayuan kedua). Kedua-dua rayuan telah dipanggil untuk perbicaraan di hadapan Mahkamah Rayuan pada 26 Februari 1997. Pada 26 Februari 1997, rayuan pertama telah dipanggil, dibicarakan dan ditolak. Rayuan kedua telah ditetapkan untuk perbicaraan pada keesokan hari. Pada keesokan hari apabila mahkamah mendengar rayuan kedua, hakim yang bersidang telah mengarahkan timbalan pendaftar untuk menarik balik rayuan pertama. Hakim yang bersidang telah memaklumkan pihak-pihak bahawa beliau membuat perintah berbangkit berkenaan rayuan pertama, di mana, perintah Timbalan Pendaftar Mahkamah Tinggi yang diberikan pada 24 Oktober 1994 adalah patut diketepikan. Ini merupakan permohonan oleh responden untuk perintah bahawa perintah cabutan Mahkamah Rayuan bertarikh 26 Februari 1997 dipinda melalui pembatalan perkataan-perkataan ' … DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran ganti rugi oleh Timbalan Pendaftar pada 24 Oktober 1994 diketepikan …' terkandung di dalam ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perkara ini tidak akan dihadapkan dalam mahkamah ini jikalau perayu telah mengaku bahawa perintah berbangkit telah dibuat pada 27 Februari 1997

selepas hakim yang bersidang telah mengarahkan Timbalan Pendaftar untuk menarik balik rayuan pertama. Jika perayu telah memberikan konsesi bahawa perintah berbangkit telah diberikan pada 27 Februari 1997 maka responden boleh mendapatkan kebenaran daripada Mahkamah Persekutuan untuk merayu terhadap perintah berbangkit tersebut (lihat perenggan 13).

(2) Perintah berbangkit telah dibuat dan diumumkan oleh hakim yang bersidang. Ini telah dibuat pada 27 Februari 1997 dan bukan pada 26 Februari 1997. Memandangkan cabutan perintah telah menyatakan bahawa perintah berbangkit telah dibuat pada 26 Februari 1997, ia adalah salah. Perintah tersebut perlu dibetulkan dan dipinda (lihat perenggan 15).]

Notes

For the case on application to amend orders, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 3642.

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Suit No S6–22–208 of 1987 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (Lim Huck Aik & Co) for the appellant.
Raja Aziz Addruse (Chew Wng Keat with him) (Khana & Co) for the respondent.

Mokhtar Sidin JCA (delivering judment of the court):

[1] This is an application by the respondent for the following orders:

(1) that the extracted order of the Court of Appeal dated 26 February 1997 be amended by deleting the words '… DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran ganti rugi oleh Timbalan Pendaftar pada 24 Oktober 1994 diketepikan… ' contained therein;

(2) costs of this application be paid by the appellant;

(3) such further and/or other relief that this honourable court deems fit to grant.

[2] In the affidavit-in-support of the application the respondent stated that on 14 May 1987 he filed a writ against the appellant. The respondent then filed an application for O 14 summary judgment under the Rules of the High Court 1980 for the following prayers:

(1) for a declaration that the decision of the appellant's disciplinary board in terminating my services by letter dated 7 May 1987 was ultra vires the Penang Port Commission Act and therefore null and void and invalid (prayer one);

(2) for a declaration that I having obtained a pass at the Bahasa Malaysia subject at the Sijil Pelajaran Malaysia examination 1976 has satisfied the appellant's condition stipulated in their letter dated 26 July 1975 to be confirmed as a traffic supervisor in the PPC's services (prayer two);

(3) for an order that damages sustained by me be assessed by the Deputy Registrar and be paid by the defendant to me together with interest at 8% per annum till the date of realisation (prayer three).

[3] On 18 July 1994, the learned judge who heard this application granted order in terms prayers one and three. There was no appeal against that decision. The respondent then applied for the damages to be assessed. The learned judge heard the application by the respondent for prayer two on 20 October 1994 and allowed it. Being dissatisfied with the decision on prayer two the appellant appealed and the appeal was registered as W–02–252 of 1994 ('the first appeal'). In the meantime, the Deputy Registrar of the High Court assessed the damages as sustained by the respondent pursuant to prayer three and on 24 October 1994 awarded damages in the sum of RM2,274,151.42 and interest at 8%pa from the date of judgment (24 October 1994) until the date of realisation. Being dissatisfied with the assessment awarded, the appellant appealed to the judge in chambers.

[4] In his affidavit, the respondent stated that there was no order for stay of execution against the damages assessed and the respondent levied execution of the assessed sum. The respondent obtained a garnishee order nisi on 23 November 1994 and was made absolute on 7 December 1994. The appellant then applied for a stay of execution of the garnishee order before the learned judge. On 19 December 1994, the learned judge dismissed the application for stay by the appellant. The appellant appealed against the decision of the learned judge dismissing the appellant's application for stay which was registered as W–03–16 of 96 ('the second appeal'). The appellant paid the garnished sum on the date their application for stay was refused. The respondent submitted that since the garnished sum had been paid, the second appeal is academic.

[5] Both appeals came up for hearing before the Court of Appeal on 26 February 1994. On that day, the appellant was represented by YM Raja Aziz Addruse and the respondent was represented by Mr RR Sethu. Normally, I would not like to refer to the judges by their names, but in the present case I felt it is necessary to do so. The Court of Appeal who heard the appeals were YA Dato' NH Chan, YA Dato' Siti Norma Yaakob and YA Dato' Abdul Malek Ahmad JJCA. YA Dato' NH Chan JCA was the presiding judge. On 26 February 1997, the first appeal was called, heard and disposed of. The second appeal was fixed for hearing on the next day. The next day, when the court was to hear the second appeal, the presiding judge instructed the deputy registrar to recall the first appeal. The presiding judge then informed the parties that he was making a consequential order in respect of the first appeal in that the order of the Deputy Registrar of the High Court given on 24 October 1994 was to be set aside. This prompted Mr RR Sethu, the learned counsel for the respondent, to submit the following:

(1) that the court had no jurisdiction to recall this file suo motto for the court was functus officio;

(2) that the court had no jurisdiction to make the order it intended to make as this would tantamount to varying the order made the previous day; and

(3) that the subject matter of the order given by the High Court Deputy Registrar on the assessment of damages was still pending before the judge of the High Court on an appeal from the Deputy Registrar and had not reached the Court of Appeal for the Court of Appeal to interfere with that order.

[6] According to the affidavit of the respondent, the counsel for the appellant did not reply or make any submission. After making the consequential order the presiding judge instructed the deputy registrar to call the second appeal. The presiding judge informed the parties that he would not be making any order in respect of the second appeal. The respondent, thinking that the presiding judge's consequential order was indeed the order of the court, filed an application to the Federal Court seeking leave to appeal against the consequential order made by the learned presiding judge. The solicitors for the appellant extracted the order and in that order it was stated that the order setting aside the High Court Deputy Registrar's award was made on 26 February 1997. The respondent pointed out that the order setting aside the award was not made on 26 February 1997 but the next day which was on 27 February 1997. Despite this, the solicitor for the appellant extracted the order.

[7] On 15 September 1997, the respondent applied to the registrar of the Court of Appeal to set aside the extracted order. The appellant opposed the application. On 28 August 1998, the Deputy Registrar of the Court of Appeal heard the respondent's application and the decision was reserved.

[8] On 23 June 1998, the judgment in respect of the first appeal written by Abdul Malek Ahmad JCA (as he then was) was delivered as the judgment of the court. The judgment shows that the Court of Appeal heard the first appeal on 26 February 1997 and the decision was made on 26 February 1997. There was no mention in the judgment that the first appeal was recalled on 27 February 1997 and the purported consequential order made by the presiding judge on 27 February 1997.

[9] The respondent contended that the order of the Court of Appeal extracted by the appellant's solicitors had caused a lot of confusion and the order ought to be corrected to reflect the actual order of the court given on 26 February 1997 which is reflected in the judgment of Abdul Malek Ahmad JCA.

[10] In their affidavit-in-reply, the appellant stated that the application by the respondent is scandalous, frivolous and vexatious or it is otherwise an abuse of the process of the court as, inter alia, it does not state the particular provision or rule for which the court is being moved to hear the said application. The appellant conceded that what was stated in the respondent's affidavit was what transpired in the High Court, ie the granting of prayers one and three on 18 July 1994 and the adjournment of the hearing of the application for prayer two. The appellant also conceded that prayer two sought by the respondent was for a declaration that the respondent was a traffic supervisor with the appellant. Pursuant to the order given by the learned judge in respect of prayers one and three, the deputy registrar then proceeded to assess the damages suffered by the respondent which began on 15 October 1994.

[11] On 20 October 1994, the learned judge heard the application by the respondent in respect of prayer two and allowed the application and also made the declaration. With this order the Deputy Registrar proceeded with the assessment for damages. On 24 October 1994, the deputy registrar awarded the sum of RM2,274,151.42 as damages to the respondent, ie RM2m for distress, anguish, anxiety, inconvenience, embarrassment and humiliation and the balance was for wrongful termination. In their affidavit, the appellant affirmed that they had appealed against the deputy registrar's award to the judge in chambers. The events leading to the hearing of this appeal as stated by the respondent were also affirmed by the appellant.

[12] On 18 November 1994, the appellant filed the appeal against the learned judge's decision in respect of prayer two. This appeal came up for hearing before the Court of Appeal on 26 February 1997, as I have stated earlier in accordance with the affidavit of the respondent. The appellant also affirmed the coram and the name of the presiding judge. The appellant also did not dispute what happened on 26 February 1997.

[13] As can be seen from the chronology of events, there was no controversy whatsoever leading to the decision on 26 February 1997. Both sides affirmed the events that took place. It is necessary for me to state the events that took place in the affidavits of both the respondent and the appellant that took place until 26 February 1997 to show that the dispute between the parties was only in respect of what happened on 27 February 1997. In my view, this matter would not be in this court if the appellant conceded that the consequential order was made on 27 February 1997 after the presiding judge instructed the deputy registrar to recall the first appeal. Had the appellant given their concession that the consequential order was indeed given on 27 February 1997, then the respondent could have proceeded to get leave from the Federal Court to appeal against that consequential order.

[14] It is on the insistence of the appellant that the consequential order was made on 26 February 1997 and not on 27 February 1997, that the respondent made this application to correct the extracted order. Since the appellant took the stand that the consequential order was not made on 27 February 1997, I take it that the appellant conceded that if the order was not made on 27 February 1997, no such order had been made. To clarify this, in my view, would be to go back to the same coram that sat on 26 February 1997. Since the matter came up before us, we have to find out whether the consequential order was made on 26 February 1997 and if no such order was made on 26 February 1997, then the extracted order was wrong in respect of the consequential order contained therein. As I have stated earlier, the extracted order was made without the approval of the respondent, due to the discrepancy in respect of the actual date it was given.

[15] As can be seen, there were no notes of proceedings made available to us. We had to rely on the affidavits filed. Fortunately for us, when this matter came up for hearing, Abdul Malek Ahmad JCA (as he then was) had delivered the judgment of the court in respect of the appeal. Perusing the judgment, I find that the judgment was only in respect of the appeal heard on 26 February 1997. There was no mention

of the consequential order or what happened on 27 February 1997. For that reason, I take it that the judgment is the correct statement of events as on 26 February 1997 and as such the consequential order was not made on 26 February 1997. Turning to the affidavits, the respondent clearly stated that the consequential order was indeed not made on 26 February 1997, but it was made on 27 February 1997 despite objections by the respondent's counsel. The appellant in their affidavit affirmed that such consequential order was indeed made, but refused to confirm or deny the date it was made. Taking the judgment and the affidavits, I am of the view that the consequential order was indeed made and pronounced by the presiding judge. This was made on 27 February 1997 and not on 26 February 1997. Since the extracted order stated the consequential order was made on 26 February 1997, it is obviously wrong. The order should be corrected and amended. The date could not be corrected because the appellant refused to do so despite letters from the respondent's solicitors. The only alternative is to accede to the application by the respondent, that is to delete the words: '… DAN SELANJUTNYA DIPERINTAHKAN bahawa taksiran ganti rugi oleh Timbalan Pendaftar pada 24 October 1994 diketepikan… '. With the amendment, the extracted order would be a reflection of the hearing of the Court of Appeal on 26 February 1997. The hearing on 27 February 1997 should not be taken into consideration and disregarded.

[16] For the above reasons, we allowed the application by the respondent with full costs fixed at RM500.00.

[17] My learned brother, Abdul Kadir Sulaiman JCA, has seen this judgment in the draft and expressed his agreement to the reasonings. My learned brother, Mohd Saari JCA has retired and could not express his views on this judgment. Anyway, we had given our unanimous decision allowing the application on 30 April 2002.

Application allowed with costs.

Reported by Peter Ling